United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,122

556

JAMES T. BRYANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from a Judgment of the
United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 3 1968

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STATEMENT OF ISSUE FOR REVIEW

Whether it is error to deny a motion for a directed verdict of acquittal where the identification of defendant is made a month after a robbery from police photos taken in a different, earlier case and not by picking out defendant from a police line-up.

(This case was not previously before this Court)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No: 22,122

JAMES T. BRYANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from a Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia, entered on June 14, 1961, convicting appellant of offenses of Robbery, and Assault With A Dangerous

Weapon. Appellant was tried by a jury to a three (3) count indictment charging Robbery and Assault With A Dangerous Weapon.

He was sentenced to imprisonment for three (3) to nine (9) years on each of counts One, Two and Three to run concurrently and to take effect at the expiration of the sentences now being served. The District Court had jurisdiction under Section 24-401 of D.C. Code (1961 ed.).

Appellant filed an affidavit in support of an application to proceed without payment of costs in the United States District Court on June 14, 1968. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

At sometime between 10:00 p.m. and 10:30 p.m. on September 17, 1967 an armed robbery occurred at the Western Union branch office at 2515 Pennsylvania Avenue, S.E., Washington, D.C. Some $70.00 was alleged to have been taken and in the course of the robbery the Western Union branch manager, Mr. Hugh Cofield, was shot in the left leg and thigh. There was testimony that the Western Union office was well lighted and that the actual robbery took three or four minutes. (Tr. 32; 47:51:91; 92, 98, 99:114: 116)

The police almost immediately broadcast a look-out for three (3) robbers, described as three Negro males about ages 24, 25 and 30. (Tr. 74)

The defendant James T. Bryant was arrested approximately a month after the robbery, on October 19, 1967. (Tr. 142) After his arrest, the defendant was taken into a room at the police station where there were two policemen and Mr. David Coddington who was an employee at the Western Union office. Mr. Coddington identified the defendant

Bryant as one of the robbers. (Tr. 52)

The branch manager Mr. Cofield identified the defendant Bryant as one of the robbers at the trial. (Tr. 93) Mr. Cofield also testified that he had seen defendant Bryant in a parked car outside the Western Union office earlier before the robbery. (Tr. 93, 94, 98)

ARGUMENT

The defendant Bryant was under the supervision of the police for an earlier robbery to which he had pleaded guilty on advice of counsel. The attorney assigned by the Court to the defendant in this case was the same attorney who had been assigned to defendant in the earlier case. At the preliminary hearing, the defendant objected to having the same attorney who had previously represented him, but to no avail. Having duly objected to his Court assigned counsel in the presence of counsel, defendant was prejudiced when his request for different counsel was refused.

The police had photographs of defendant Bryant from the earlier case and arrested defendant solely on the basis of photos already in the possession of the police. (Tr. 72) Defendant was never picked out of any line-up and it was clearly prejudicial to defendant to deny him the protective safeguard of identification from a police line-up.

The trial record shows that defendant was arrested more than a month after the alleged robbery

as the result of a "tip" to the police, which could have been the result of a vicious neighbor, busybody or any trouble-maker. It was a simple matter for the police to take defendant's photograph out of their files, take it to Messrs. Cofield and Coddington, and suggest defendant as a suspect. The natural inclination of the police would be, since over a month had elapsed without any arrests, to persuade Cofield and Coddington to identify the defendant as one of the robbers.

Defendant believes that on a previous occasion when a delicatessen at the corner of Florida Avenue and Staple Street, N.E. was robbed, the manager of that store was shown a picture of defendant and the police tried to get the manager to identify defendant's photograph as that of one of the robbers, which the delicatessen manager refused to do according to information which the manager told to defendant.

The descriptions of the alleged robber on Form P.D. 251 were inconsistent with the descriptions given by the witnesses and did not fit defendant

whose age, height, weight and build were different. (Tr. 74:85:154:155) The only common characteristic was that one of the robbers was alleged to have a beard, and defendant had a beard when he was arrested. The wearing of beards has become rather common and "guilt by beard" is no more reliable than "guilt by association" as a means of testing guilt or innocence.

The testimony indicated that the police may have first informed Mr. Cofield and Mr. Coddington that they had a suspect and then showed the photos of defendant, without ever requiring either Mr. Cofield or Mr. Coddington to pick out the defendant from a line-up. Under such a procedure it was very easy for the witnesses to mistake the identity of the defendant and to incorrectly identify him as one of the robbers. (Borchard "Convicting the Innocent" 1932 at xii; Frank "Not Guilty" 1957, p.31)

The police acknowledged that defendant was at No. 9 Precinct at 9:23 p.m. (Tr. 127:149) The defendant himself testified that after he left No. 9 Precinct he went to his mother's house and there

spent most of the evening. The police had descriptions of the robbers which were broadcast almost immediately after the robbery, and they knew and saw defendant at 9:23 p.m. on the night of the robbery but did nothing towards apprehending defendant until over a month later when they received a "tip" from an unidentified informer. It is common knowledge that personal enemies out of spite turn in "tips" to the police for their own private motives. Surely stronger evidence connecting defendant with the crime should be required than a "tip" and subsequent identification based on a police photo, without benefit of a police line-up.

The testimony showed that there was a witness to the robbery, one Jayne Sutherland, who gave a statement to the police which was never disclosed. (Tr. 76, 30, 31, 32, 125) Yet the police failed to find her or to produce her at the trial, thereby prejudicing defendant, since her testimony might have corroborated the defense of mistaken identity.

Defendant denied under oath that he took any part in the alleged robbery. (Tr. 134:140)

Defendant should be presumed innocent until proven guilty. The evidence presented by the prosecution did not establish beyond a reasonable doubt that the defendant was in fact one of the robbers.

CONCLUSION

The defendant prays that the judgment of guilty be reversed on the ground that the trial judge erred in denying defendant's motion for a directed verdict in that the identity of defendant was never established beyond a reasonable doubt, that he was mistakenly identified as one of the robbers and that his identification was not convincing beyond a reasonable doubt.

Respectfully submitted,

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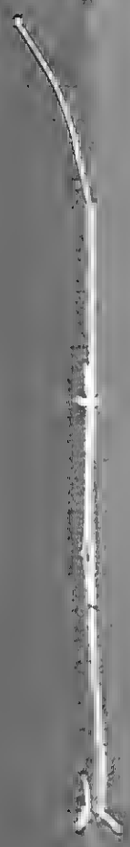

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

Should the trial court have granted appellant's motion for a directed verdict of acquittal where two eyewitnesses made positive in-court identifications in the Government's case-in-chief?

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* This case has not been previously presented to this Court under the same or similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,122

JAMES T. BRYANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed December 20, 1967, appellant was charged in the first count thereof with robbery (D.C. Code 1967 § 22-2901) of the Western Union Telegraph Co., taking approximately $70; and with two counts of assault with a dangerous weapon (D.C. Code 1967, § 22-502) on one David E. Coddington, and one Hugh Cofield, all the alleged offenses having taken place on or about September 17, 1967. At trial on May 6 and 7, 1968, before United States District Court Judge John Lewis Smith, Jr., sitting with a jury, appellant was found guilty as charged on all three counts. He was sentenced on June

14, 1968, to three to nine years on each count to run concurrently, and appellant's motion to proceed on appeal in forma pauperis was granted the same day.

The Trial

The Government's evidence at trial showed as follows: On September 17, 1967 at approximately 8:14 P.M., one Preston Rose, an automobile messenger for the Western Union Telegraph Company working in their office located at 2515 Pennsylvania Avenue, S.E., noticed three men sitting in a Black Thunderbird automobile parked near the Western Union office. (Tr. 30, 38, 40-41). His attention was drawn to the vehicle because the three men were looking towards the office (Tr. 43). While Mr. Rose was unable to identify the three men, he did notice that one of the men sitting in the right rear of the car had a mustache that covered the area of the upper lip and chin (Tr. 31, 42). When Mr. Rose went into the telegraph office, he related what he had seen to Mr. Hugh Cofield who was the manager of the office and Mr. David E. Coddington, an employee there, and jotted down the license number of the vehicle in question before he left to deliver telegrams (Tr. 39, 43). Thereafter, Mr. Cofield went outside the office to get coffee and saw four Negro males in the car Mr. Rose had previously seen (Tr. 88-89). In the front seat he noticed one man with a board and a mustache, the appellant, and another that was young and thin looking who had a lot of hair (Tr. 89, 98, 107, 114). After getting his coffee at a shop nearby he returned to the office at approximately 8:30-8:40 P.M. passing the car on his way back and seeing the same men in the car (Tr. 90, 104).

Later that evening, shortly after 10:00 P.M., three Negro men entered the Western Union office and after being queried by Mr. Cofield as to whether they could be helped, two of the men, neither of them the appellant, drew what appeared to be .45 calibre automatic pistols and ordered Cofield and Coddington to lie on the floor of the office (Tr. 46, 104, 118). While two of the men

(one of which was the appellant) knelt on Cofield, the other man ordered Coddington to get up and empty a cash drawer containing approximately $70 (Tr. 46). While on the floor Cofield, who was ordered to keep his hands in back of him touched something that felt like "cold steel" or "like a barrel" that was about two feet long, lying across his legs (Tr. 96-97). The robbers were in the office from 3 to 5 minutes and just prior to their leaving Mr. Cofield was shot in "the upper third of the right thigh" with some 200 shotgun pellets lodging in his leg causing extensive nerve damage (Tr. 97-98). A shotgun was never seen by Coddington or Cofield, however, in anyone's hands (Tr. 114). The Western Union Office was very well lit by flourescent lights (Tr. 32, 47, 91). Both Coddington and Cofield made positive identifications in court, although both remarked that appellant, since the time of the robbery, had gained weight and had shaved off the mustache and goatee they said he had worn on September 17, 1967 (Tr. 52-53, 94, 107, 121).[1]

Coddington and Cofield (in response to inquiries by counsel for appellant) also stated that approximately one month after the robbery they were shown from 10 to 16 photographs and both picked appellant's picture out of the group (Tr. 71-72, 107, 123). Both Coddington and Cofield also agreed that they saw only one photograph of appellant among the group of pictures shown them (Tr. 77, 107, 123).

The evidence also brought out the fact that there had been another witness to the robbery, a Miss Jane Sutherland. Detective-Sergeant James K. Kelly and Private Richard R. Henry of the 11th Precinct testifying for the Government, related their extensive efforts to locate Miss Sutherland sometime prior to the trial to no avail (Tr. 81-82, 124-126).

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[1] Complainant Coddington was impeached as to the prior description that he testified to at appellant's preliminary hearing, which varied somewhat from those he had given in court (Tr. 59-62). Thereafter, the trial court instructed the jury on impeachment evidence (Tr. 62).

After the testimony of Detective-Sergeant Kelly the Government rested its case (Tr. 128). Whereupon, defense counsel moved for a directed verdict of acquittal on the ground that the identifications of appellant by the complainants Coddington and Cofield were made from photographs rather than a lineup and that these identifications were made sometime after appellant had been "implicated" in the robbery by an unidentified source (Tr. 129-130). The trial court felt that the evidence was contrary to the defense counsel's allegations, and denied his motion (Tr. 130).

The defense then called as its first witness the appellant Bryant (Tr. 133). Appellant testified that although he could not recall clearly where he had been on September 17, 1967, he had been told that his name had been signed to a register at the Ninth Precinct located at 9th Street between F and G Streets, N.E., at approximately 9:23 P.M. on the night in question and identified his signature on that register (Defendant's Exhibit 7) (Tr. 134, 150). Appellant also noted that because September 17 was a Sunday, he, therefore, had been to his mother's house located near the Ninth Precinct (Tr. 134, 136-137). He indicated also that, in addition to his mother, his aunt and her children, possibly his brother and sister-in-law, and appellant's own children were at his mother's house that evening (Tr. 139-141). Appellant admitted, however, that none of his family remembered the night of September 17 with any particularity, although he stated that his mother told him that she could not recall his ever missing a Sunday visit (Tr. 144). Appellant testified that he went to the precinct before going to his mother's house and that he stayed at his mother's somewhere between an hour to an hour and a half, and, thus was at his mother's during the time of the robbery (Tr. 140).

Appellant also admitted that on September 17, he wore a mustache and a goatee, and that he was heavier at the time of the trial than on September 17 (Tr. 145-146). Appellant testified that his arrest took place either on October 17, or 19, 1967 (Tr. 134, 142), and that at the

time of his arrest he was wearing a mustache and a goatee and identified a picture taken of himself on the night of his arrest (Tr. 145-146).

The defense next called Detective-Sergeant James H. King, Jr. of the Robbery Squad who stated that he arrested appellant after getting an identification on the subject, and receiving word on October 19, 1968, that appellant was at the Ninth Precinct (Tr. 152).[2] Sergeant King also identified two reports made by him one dated October 20, 1967 and the other October 22, 1967 (Defendant's Exhibits 8-9 respectively) (Tr. 153-154). While the descriptions of the appellant appear to vary in minor respects, Sgt. King noted that the report made on the 20th of October was made shortly after appellant's arrest and that the report of the 22nd was made from his recollection of appellant's appearance (Tr. 156-157, 158-159). Sergeant King who testified to being familiar with that section of the city in which both the Ninth Precinct and the Western Union Office were located, stated that it would take from 8 to 10 minutes to drive from the precinct to the Western Union office, although he could not tell how much time it would take to walk the distance approximately 20-22 blocks (Tr. 161). Sergeant King also estimated that it would take at least 20 to 25 minutes to drive from the 2500 block of Pennsylvania Avenue, S.E. (the location of the Western Union Office) to the Ninth Precinct, let a passenger out to sign the precinct book and return to Pennsylvania Avenue (Tr. 161-162). Thereafter the Government called Robert L. Pleger assigned to the special operations Division of the Metropolitan Police Department who testified to having driven from the Ninth Precinct to the 2500 block of Pennsylvania Avenue, S.E. at 11:55 A.M. on May 7, 1968 in nine minutes (Tr. 168-170). Appellant's trial counsel then re-

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[2] Note, in his brief appellant asserts that "[a]fter his arrest, the defendant was taken into a room at the police station where there were two policemen and Mr. David Coddington who was an employee at the Western Union office." (Appellant's Brief p. 3) The Government has found nothing in the record before this court

newed his motion for a judgment of acquittal for the record and the defense rested its case (Tr. 171).

ARGUMENT

The fact that complainants' in-court identifications were based partially on previous photographic identifications prior to arrest did not warrant granting appellant's motion for directed verdict of acquittal.

(Tr. 52-53, 71-72, 81-82, 94, 107, 121, 123-126, 129-130, 203)

Appellant's principal contention on appeal is that the trial court erred on not granting his motion for directed verdict of acquittal on the ground that he was identified by the complainants from police photographs rather than having been picked out of a lineup. This argument is clearly frivolous. While the question of how and when the identifications were made would be quite relevant to the admissibility of such evidence, *Simmons* v. *United States*, 390 U.S. 370 (1968); *Stovall* v. *Denno*, 388 U.S. 293 (1967), the fact that certain identifications of appellant were by photograph has no bearing in this case as to whether the trial court should have taken the case from the jury. A study of the record reveals ample evidence adduced in the Government's case in chief, e.g., the complainants' in-court and out-of-court identifications of appellant, from which a jury could have found appellant's guilt beyond a reasonable doubt. *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).[3]

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to substantiate that factual assertion. (Appellant's brief which is not paginated will be cited p. 1 through 10, starting with appellant's "Jurisdictional Statement").

[3] Any argument that the admissibility of the out-of-court photographic identifications made by the complainants prior to appellant's arrest violated due process, *Simmons* v. *United States*, 390 U.S. 370 (1968); *Stovall* v. *Denno*, 388 U.S. 293 (1967), appears not to have been sufficiently raised on appeal. The record before this

Other arguments raised in appellant's brief are equally meritless. Regarding the failure of the Government to produce a witness, Miss Jane Sutherland (Appellant's Brief, p. 8), Detective-Sergeant Kelly and Private Richard R. Henry testified at length on their thorough but vain efforts to locate this witness (Tr. 81-82, 124-126).

Court indicates that on May 2, 6, 1968, the trial court heard and denied appellant's oral motion to suppress certain in-court identifications. Later, defense counsel "opened the door" by initiating the questioning with regard to the photographic identifications by the complainants (Tr. 71, 107), thereby foregoing any possibility of objection to their admissibility. Appellant's appellate counsel does not question the right of the complainants to testify, but makes the unique argument that because their in-court identifications were based (at least partially on previous photographic identifications) the trial court should have taken the case from the jury. No case law authority is cited in support of this proposition. Appellant does infer, rather broadly (Appellant's Brief p. 6), that the photographic identifications were overly suggestive. A careful study of the record before this Court reveals no factual basis for these inferences. In response to questions by defense counsel, the complainants stated that they were shown from 10 to 16 police photographs, only one of which was of the appellant (Tr. 71-72, 107, 123). No testimony was adduced that the police had indicated to the complainants that they either had a suspect or that the police indicated which of the photographs was that of the appellant. *Cf. Simmons* v. *United States*, 390 U.S. at 383. Both complainants were unequivocal in their identifications of the appellant at trial, despite extensive cross examination (Tr. 52-53, 94, 107, 121). *Cf. Simmons* v. *United States, id.* at 385. Thus, on the record before this court no circumstances have been shown that "* * * were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States, id.* at 384. See also *Stovall* v. *Denno, supra*, 388 U.S. at 301-302.

The fact that the photographic identifications may have been made after the police received information from a previously reliable source (Appellant's Brief, pp. 5-6) (Tr. 129-130) "implicating" appellant in the robbery (the only indication of this fact in the record before this Court is apparently found in the affidavit of the police in support of their request for an arrest warrant for the appellant (see Record Index No. 1) is indicative that the police were merely being prudent in obtaining corroberation of the informant's "tip" in order to establish probable cause to arrest appellant. Clearly a defendant cannot be placed in a lineup unless he is lawfully under arrest. *Cf. Adams* v. *United States*, D.C. Cir. Nos. 20,547-49 (decided June 21, 1968); *Bynam* v. *United States*, 104 U.S. App. D.C. 368, 262 F.2d 465 (1959).

The trial court, in addition, gave the jury the "missing witness" instruction (Tr. 203), and thereafter it was for the jury to decide what effect the Government's failure to produce this witness should have on the outcome of the case.

The fact that complainant Coddington's testimony at trial may have varied somewhat with the descriptions he had given to police earlier or when testifying at appellant's preliminary hearing (Appellant's Brief, pp. 6-7), presented a question of credibility to be resolved by the trier of fact, in this case the jury.

Appellant's argument regarding his alleged objection to the appointment of counsel at his preliminary hearing (Appellant's Brief, p. 5) should not be heard by this Court. Nowhere in the record before this Court does it appear that the question was raised or that an objection was made regarding the appointment of counsel at this stage.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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